IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

against

MITSUI & CO., (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.lli, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF FOR RESPONDENT R. PAGNAN & F.lli IN RESPONSE TO PETITION FOR WRITS OF CERTIORARI

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Restatement of the Case

Our client, the Respondent R. Pagnan & F.lli ("Pagnan"), is an Italian partnership with offices at Padua (Padova), Italy; Petitioner Fribesco S.A. ("Fribesco") is a Swiss corporation with offices at Lausanne, Switzerland; Respond-

ent Finagrain S.A. ("Finagrain") is a Swiss corporation with offices at Geneva, Switzerland; and, Respondent Louis Dreyfus Corporation ("Dreyfus") is a corporation organized under the laws of one of the states of the United States of America, with offices at New York City.

Pagnan is both buyer and seller of the U.S. export corn concerned in two of the disputes mentioned in the Petition, wherein broad arbitration clauses were contained in each of Pagnan's international purchase and sale contracts. In each instance, the market price of the commodity sold f.o.b. ocean going export vessel greatly declined between the dates of contract and the dates of delivery; and, when Pagnan's buyer (Fribesco) precipitiously failed to take delivery of the contracted quantities of grain from Pagnan's sellers (Finagrain and Dreyfus), Pagnan's sellers then demanded arbitration against Pagnan, and Pagnan demanded arbitration against Fribesco.

[Because of the importance of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 21 U.S.T. 2517, T.I.A.S. No. 6997 (Dec. 29, 1970) ("The Convention"), to consideration of the Petition herein, the international quality of the parties and of the instant transactions becomes most important.]

In each instance, Pagnan petitioned the trial level court to direct Fribesco and Pagnan's respective seller to proceed to arbitrate in one consolidated arbitration proceeding, or, alternatively, for the court to direct the manner in which proceedings commenced against Pagnan be otherwise heard and determined together with the proceedings commenced by Pagnan against Fribesco (and for other relief).

As an intermediate buyer and seller, Pagnan has played no part in the inspection controversy which apparently underlies these proceedings. Having been caught up in the middle of this dispute, Pagnan's primary concern is that

the dispute between its buyer and its seller be heard and determined together in one consolidated proceeding (whether before the arbitrators or before a court) in order to avoid a multiplicity of proceedings, expedite determinations and insure each party of appropriate relief. Consequently, Pagnan adopts each and every argument advanced by Fribesco into that portion of the proceedings concerned with its sellers, and Pagnan similiarly adopts each and every argument advanced by its sellers into that portion of the proceedings concerned with Fribesco.

However, Pagnan submits this brief in support of its opinion that further review of this matter by this court may not be warranted because the decisions Petitioners seek to have reviewed (enforcing the arbitration clauses in the instant international commercial contracts, and directing consolidated arbitration proceedings) are in accordance with previous decisions of this court and, further, this court would likely affirm the decisions below on the factual grounds of estoppel and waiver. Pagnan believes that the law and the circumstances of these cases so clearly require that result.

Additional Statutes, Regulations and Treaties Construed

United States Grain Standards Act 7 U.S.C. §§ 75(j), (r); 79(b), (c); 87c; 87e; 87f (Set forth at App. pp. 1a-4a).

5 U.S.C. §§ 701-706 (Set forth at App. pp. 4a-8a).

Regulations of the Dep't of Agriculture, 7 CF.R. §§ 26.30; 26.35; 26.36; 26.45; 26.46; 26.48(a), (e), (f) (Set forth at App. pp. 8a-19a).

Convention of the Recognition and Enforcement of Foreign Arbital Awards, Article II, 21 U.S.T. 2517, T.I.A.S. No. 6997 (December 29, 1970) (Set forth at App. p. 20a).

ARGUMENT

POINT I

The petition has not shown jurisdiction to exist in this Court.

28 U.S.C. § 1257(3) provides, in part, for the jurisdiction of this court to review final judgments of state courts

> ". . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissions held or authority exercised under, the United States."

This court might well determine that the Petition herein fails to supply any basis for a claim that any right asserted under the federal authorities, set forth in 28 U.S.C. § 1257 (3), is violated by Justice Stecher's order directing arbitration. Such determination might be predicated upon a finding that the Petition has failed to show the existence of any federal "right" to stay arbitration.

POINT II

Supreme Court Rule 19 considered: Treaty, Statutory Law and Decisional Law uniformly require enforcement of international commercial agreements to arbitrate.

If this court should determine that jurisdiction exists under 28 U.S.C. § 1257(3), Sup. Ct. R. 19 remains to be considered before this court will exercise its discretionary powers to issue a Writ of Certiorari. That Rule provides in part:

> "1. A review on a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a State court has decided a federal question of substance not theretofore determined by this Court or has decided it in a way probably not in accord with the applicable decisions of this Court."

The below mentioned authorities appear to speak with one voice in favor of upholding international commercial agreements to arbitrate.

The Convention, *supra,* provides that:

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable or settlement by arbitration."
>
> Art. II, para. 1.

The federal implementing legislation provides:

> "An arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . falls under the Convention."
>
> 9 U.S.C. § 202.

In at least two recent cases, this court has forcefully spoken in favor of enforcement of arbitration provisions contained in international commercial agreements, and the lower federal courts have properly followed in directing arbitration in international commercial cases:

Scherk v. *Alberto-Culver Co.,* 417 U.S. 506 (1974);

Bremen v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1971);
Fotochrome, Inc., v. *Copal Co., Ltd.*, 517 F.2d 512 (2d Cir. 1975);
Parsons & Whittemore Overseas Co., Inc. v. *Societe Generale de L'Industrie Du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974);
McCreary Tire & Rubber Co. v. *CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974).

In particular, the case of *Scherk, supra,* is an enlightening commentary on the arguments advanced by the instant Petitioners. Making reference to the U.S. Arbitration Act (9 U.S.C. § 1-14, 201-208), The Convention, that treaty's own enactment into U.S. domestic law at 9 U.S.C. 201, et seq., as well as this court's own decision in *Bremen, supra,* this court found a strong affirmative U.S. policy in favor of arbitration:

> "Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."
>
> at 516.

In enforcing the agreement to arbitrate, this court concluded at 519:

> "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . .' (citing Bremen, supra).
>
> "For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced. . . ."

In reaching its result in *Scherk,* this court distinguished and limited its earlier decision in *Wilko* v. *Swan,* 346 U.S. 427 (1953), upon which Fribesco relies so heavily.

This court found one of the "crucial differences" between the *Wilko* contract and the *Scherk* contract to be that the *Scherk* contract "• • • was a truly international contract." *Id.* at 515.

A second important distinction between the facts presented to this court in *Wilko* and those presented in *Scherk* is that, in *Wilko,* this court determined that ". . . the judicial forum is the kind of 'provision' that cannot be waived under Section 14 of the Securities Act." *Wilko, supra* at 434-5.

The same characteristics found by this court in *Scherk* are present in the instant Dreyfus/Pagnan/Fribesco and Finagrain/Pagnan/Fribesco disputes. First, neither in *Scherk* nor in these disputes, was it determined that the legislature had created an explicit or an exclusive right of recovery in federal (or any other) court. Indeed, in this case, the Grain Standards Act, 7 U.S.C. § 71-87h, itself contains no forum provisions whatever for judicial determination of the rights of the grain buyers and sellers *inter se,* thereby positing an even weaker case for judicial intervention than faced this court in *Scherk.* Second, both *Scherk* and these disputes involve a "truly international agreement," a circumstance in which the upholding of the

freely made choice of forum for the resolution of disputes is paramount.

In connection with this court's Rule 19 decision whether or not to issue the discretionary Writ of Certiorari, this Court should consider that the state court decisions sought to be reviewed are in conformity with the ruling of this Court in *Scherk*.

POINT III

The instant case may not be a proper case for review by this court, as it will likely be decided on the factual grounds of estoppel and waiver.

Even should this court be disposed to render a further decision in the area of the enforcement of arbitration provisions contained in international commercial agreements, this court might well conclude that the precipitious manner of Petitioners' conduct, as well as Petitioners' failure to utilize available administrative and judicial remedies, waived any right to assert a "public policy" argument.

Judicial Remedies Available to Fribesco, But Avoided.

Under the judicial procedures established by 5 U.S.C. §§ 701-706, if Fribesco, at any time, either before or after presenting its vessel to receive its cargo, believed itself to be "inadequately" protected by existing procedures[1] or threatened with "irreparable injury",[2] Fribesco could have immediately sought a judicial determination of the validity of such procedures and regulations which it might have claimed were invalid.

Fribesco never sought any timely judicial determination.

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[1] 5 U.S.C. § 703.

[2] 5 U.S.C. § 705.

Administrative Remedies Available to Fribesco, But Avoided.

In 7 U.S.C. § 75(j), the Grain Standards Act ("GSA") defines the term "official inspection personnel" who are to uniformly "perform functions involved in official inspection under this Act" including the function of handling appeals from determinations made thereunder. 7 U.S.C. § 75(r) further includes Fribesco (as a contract purchaser of grain) within the definition of an "interested person" entitled to make requests for inspection, reinspections and appeal inspections under GSA §§ 79(b) and (c) and under the regulations thereunder promulgated by the Secretary of Agriculture.

Under established United States Department of Agriculture ("USDA") regulations, Fribesco (as an "interested person") could have requested a succeeding original inspection,[3] a reinspection,[4] an appeal inspection by USDA personnel,[5] an appeal inspection by the Grain Division's Board of Appeals and Review,[6] and, if Fribesco so desired, it could have sought judicial review of any adverse administrative decision pursuant to 5 U.S.C. § 703.

In 7 U.S.C. § 79(c), the GSA itself provides for the cancellation of grain inspection certificates superseded by reinspections and appeal inspections which such interested party (as Fribesco) might have requested.

In 7 U.S.C. § 87(c) criminal penalties are provided for violations of the GSA and 7 U.S.C. § 87(f) confers jurisdiction upon the U.S. District Courts.

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[3] 7 C.F.R. § 26.30.

[4] 7 C.F.R. §§ 26.35 and 26.36.

[5] 7 C.F.R. §§ 26.45, 26.46, 26.48(a), (c), (e) and (f).

[6] 7 C.F.R. § 26.50.

Fribesco does not allege that it ever made any request whatsoever of the official inspection agency or of the USDA, or of any court.

Fribesco took none of these actions.

By following proper procedures, Fribesco could have assured to itself a proper judicial review of any USDA action (5 U.S.C. § 704), binding upon that department (and this fact alone should lay to rest Fribesco's claim that United States public policy somehow requires that the instant matter—to which the USDA is not a party—should be determined by a court).

We note that the following cases would hold that Fribesco's refusal to challenge existing USDA regulations and customary procedures by taking advantage of existing judicial and administrative procedures designed to protect it against erroneous determinations of grade, which procedures (1) might have enabled Fribesco to obtain inspection procedures subsequent to the mechanical sampling device to which it objected, and (2) would have resulted in a determination binding upon the USDA, now precludes Fribesco from attacking these same regulations (both before the courts and before the arbitrators). *Farmers Elevator Mutual Ins. Co.* v. *Stanford,* 280 F. Supp. 523 (N.D. Texas 1967) *aff'd,* 5th Cir. 1969, 408 F.2d 776 (5th Cir. 1969), *Elbow Lake Coop. Grain Co.* v. *Commodity Credit Corp.,* 144 F. Supp. 54 (D. Minn. 1956) *aff'd,* 251 F.2d 633 (8th Cir. 1958) and *Farmers Coop. Elevator Co.* v. *Commodity Credit Corp.,* 1956, 144 F. Supp. 65 (D. So. Dak. 1956).

These cases stand for the proposition that neither the allegation that the method of sampling violated a regulation of the Secretary,[7] nor the allegation that the method of

[7] Elbow Lake, supra, at pp. 57 and 59, Farmers Coop. Elevator Co., supra, 65 at pp. 67 and 70.

taking an appeal was not proper,[8] nor the allegation that the Secretary lacked jurisdiction to make the inspection,[9] can be asserted in collateral proceedings by a party which failed to avail itself of the reinspection, appeal and other administrative review procedures established by regulation of the Secretary as provided in the GSA, and by the provisions of the Administrative Procedure Act, 5 U.S. Code 701, et seq.

In view of the comprehensive GSA scheme of administrative review by reinspection and by appeal inspection, etc., the judicial determinations in *Elbow Lake, supra,* and *Farmers Elevator Mut. Ins. Co., supra,* indicate that the reliance which Fribesco places on the patent law case of *Lear Inc.* v. *Adkins,* 395 U.S. 653 (1969), is misplaced. Contrary to the comprehensive administrative and judicial procedures available in grain matters (wherein Fribesco had full opportunity to raise all issues it might have desired to raise), there is no similar opportunity to raise issues in the patent matters discussed in the *Lear* case. This crucial distinction is obvious from the mere reading of *Lear,* wherein this Court recognized that

> ". . . the Patent Office is often obliged to reach its decision in an ex parte proceeding without the arguments which could be advanced by parties interested in proving patent invalidity. Consequently, it does not seem to us to be unfair to require a patentee to defend the Patent Office's judgment when his licensee places the question in issue. . . ." ID at 670.

We submit that a doctrine more appropriate to the facts of this case is the doctrine requiring exhaustion of avail-

[8] Elbow Lake, supra, at p. 59 and Points 8 and 9 at pp. 62-63 Farmers Coop. Elevator Co., supra, at p. 70.

[9] Elbow Lake, supra, and Point 9 at pp. 62-63.

able administrative remedies before resort is had to the courts. We submit that

> "The necessity for prior administrative consideration of an issue is apparent where, as here, its decision calls for the application of technical knowledge and experience not usually possessed by judges." *F.P.C.* v. *Colorado Interstate Gas Co.*, 308 U.S. 492, 501 (1955).

In connection with this court's Rule 19 decision, whether or not to issue the discretionary Writ of Certiorari, this court should consider that this matter would likely be resolved on the factual grounds of estoppel and waiver.

Conclusion

Pagnan is the proverbial "man in the middle". Its main concern is that each dispute between itself and its buyer and sellers be heard in one consolidated proceeding to insure each party of appropriate relief and to keep costs to a minimum.

To this end, Pagnan contends that a review by this court of the instant proceedings may not be warranted because of lack of proper jurisdiction, lack of proper subject matter for the granting of the Writ, and, if the Writ were in fact given, that the court would affirm the lower court ruling either on the ground of its conformance with the court's prior decisions or on the ground of estoppel and waiver.

Respectfully submitted,

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APPENDIX

APPENDIX A

Statutes and Regulations.

United States Grain Standard Act (Title 7, U.S.C. §§ 71-87h)

75(j) The term "official inspection personnel" means persons licenced or otherwise authorized by the Administrator pursuant to section 84 of this title to perform all or specified functions involved in official inspection, official weighing, or supervision of weighing, or in the supervision of official inspection, official weighing or supervision of weighing;

(r) the term "interested person" means any person having a contract or other financial interest in grain as the owner, seller, purchaser, warehouseman, or carrier, or otherwise;

Inspection made pursuant to request of interested persons

79(b) The Administrator is further authorized, upon request of any interested person, and under such regulations as he may prescribe, to cause official inspection to be made with respect to any grain whether by official sample, submitted sample, or otherwise within the United States under standards provided for in section 76 of this title, or, upon request of the interested person, under other criteria approved by the Administrator for determining the kind, class, quality, or condition of grain, or quantity of sacks of grain, or other facts relating to grain, whenever in his judgment providing such service will effectuate any of the objectives stated in section 74 of this title.

Reinspection and appeals; cancellation and surrender of superseded certificates; sale of samples

(c) The regulations prescribed by the Administrator under this chapter shall include provisions for reinspec-

tions and appeal inspections; cancellation and surrender of certificates superseded by reinspections and appeal inspections; and the use of standard forms for official certificates. The Administrator may provide by regulation that samples obtained by or for employees of the Service for purposes of official inspection shall become the property of the United States, and such samples may be disposed of without regard to the provisions of the Federal Property and Administrative Services Act of 1949, as amended.

§ 87c. Criminal penalties

(a) Any person who commits an offense prohibited by section 87b of this title (except an offense prohibited by paragraphs (a)(7), (a)(8), and (b)(4) in which case he shall be subject to the general penal statutes in Title 18 relating to crimes and offenses against the United States) shall be guilty of a misdemeanor and shall, on conviction thereof, be subject to imprisonment for not more than twelve months, or a fine of no more than $10,000, or both such imprisonment and fine; but, for each subsequent offense subject to this subsection, such person shall be guilty of a felony and shall, on conviction thereof, be subject to imprisonment for not more than five years, or a fine of not more than $20,000, or both such imprisonment and fine.

(b) Nothing in this chapter shall be construed as requiring the Administrator to report minor violations of this chapter for criminal prosecution whenever he believes that the public interest will be adequately served by a suitable written notice or warning, or to report any violation of this chapter for prosecution when he believes that institution of a preceeding under section 86 of this title will obtain compliance with this chapter and he institutes such a proceeding.

(c) Any officer or employee of the Department of Agriculture assigned to perform weighing functions under this chapter shall be considered as an employee of the Department of Agriculture assigned to perform inspection functions for the purposes of sections 1114 and 111 of Title 18.

§ 87f. Enforcement provisions—Subpoena power

(a) For the purposes of this chapter, the Administrator shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person with respect to whom such authority is exercised; and the Administrator shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation by the Administrator, and may administer oaths and affirmations, examine witnesses, and receive evidence.

Disobedience of subpoena

(b) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States at any designated place of hearing. In case of disobedience to a subpoena the Administrator may invoke the aid of any court designated in paragraph (h) of this section in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Court order requiring attendance and testimony of witnesses

(c) Any such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Administrator or to produce documentary evidence if so ordered, or to

give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Fees and mileage costs of witnesses

(d) Witnesses summoned before the Administrator shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses from whom depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Violation of subpoena as misdemeanor

(e) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the Administrator, shall be guilty of a misdemeanor, and upon conviction thereof be subject to the penalties set forth in subsection (a) of section 87c of this title.

5 U.S.C. §§ 701-706

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such

action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required

by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrtary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pertinent Provisions of Regulations under the United States Grain Standards Act (in force at time that the present action arose).

§ 26.30 Succeeding original inspections.

(a) *General provisions.* In cases where an original inspection has been obtained in any designated inspection area on a specific lot or submitted sample of grain, and a later or more current inspection of the same kind (scope) is desired in the same area on the same lot or sample of grain, one or more succeeding original inspections may be obtained in accordance with paragraphs (b) through (i) of this section.

(b) *Requests.* A request for a succeeding original inspection shall be made in accordance with the provisions for original inspections in § 26.25 and 26.26. Each request shall show the identity of the preceding original inspection

certificate(s). If a request is not for the same kind (scope) of inspection, it will be deemed to be a request for an original inspection.

(c) *Grounds for dismissal.* A request for a succeeding original inspection may be withdrawn or dismissed in accordance with the provisions of § 26.10 and 26.27, or when a reinspection or an appeal inspection can be obtained from the preceding original inspection and will better fit the needs of the applicant.

(d) *Scope, order, and method of inspection.* (1) The scope of each succeeding original inspection shall be in accordance with the request for the original inspection. The method and order of performing a succeeding original inspection shall be in accordance with the provisions of § 26.12.

(2) For the purpose of this section, statistical tolerances for expected variations between inspections shall be applied to the results of the succeeding original inspection in determining whether the results of the preceding original inspection(s) were or were not materially in error. The statistical tolerances shall, in all cases, be those set forth in the instructions.

(e) *Certification.* For each succeeding original inspection, an official certificate shall be issued in accordance with § 26.29, subject to the following provisions: (1) In performing a succeeding original inspection, the official inspection personnel shall determine whether the results of the preceding inspection(s) are materially in error. If the results are not materially in error, the results of the preceding original inspection(s) and the results of the succeeding original inspection shall be averaged, and the resulting averages shall be shown on the official certificate for the succeeding original inspection. If the results of

the preceding original inspection(s) are materially in error, only the results of the succeeding original inspection shall be shown on the official certificate for the succeeding original inspection.

(2) The certificate for a second original inspection shall show the statement "Second Original Inspection". Certificates for succeeding original inspections in the same designated inspection area shall similarly identify the succeeding original inspections in numerical order.

(3) An official certificate for a succeeding original inspection shall supersede the last preceding official certificate for the same kind (scope) of inspection. In such case, the succeeding certificate shall clearly show, in the space provided for remarks, the following statement in completed form: "This certificate supersedes certificate No. dated ." (The number shown in the statement shall, in all cases, include the lettered prefix.) The superseded certificate shall be considered null and void as of the date of the issuance of the succeeding certificate and shall not thereafter be used to represent the grain described therein.

If the superseded certificate is in the custody of the official inspection agency or the Grain Division, the superseded certificate shall be marked "Void" in a clear and conspicuous manner. If, at the time of issuing the succeeding official certificate, the superseded certificate is not in the custody of the official inspection agency or the Grain Division, the statement "The superseded certificate identified herein has not been surrendered" shall be clearly shown in the space provided for remarks on the succeeding official certificate. Official inspection personnel shall exercise such other precautions as may be found necessary to prevent the fraudulent or unauthorized use of the superseded certificate.

(f) *Reinspections.* A reinspection or appeal inspection may be obtained from any succeeding original inspection in accordance with the provisions of §§ 26.35 through 26.39 and §§ 26.45 through 26.50.

(g) *Applicable to all movements.* The provisions of this section shall be applicable to any type of movement or any combination of movements (in, out, local) within a designated inspection area.

(h) *Loss of identity.* If the identity of a lot or submitted sample of grain is lost as provided in § 26.17, an original inspection may be obtained on the grain without reference to any previous inspection.

(i) *Inspection in other area.* If grain has been inspected in one designated inspection area and has moved to another area, any applicant may obtain an original inspection in the other designated inspection area. Such inspection in the other area shall be considered an original inspection and not a succeeding original inspection.

§ 26.35 Who may request a reinspection.

(a) *General.* A reinspection from an original inspection (or succeeding original inspection) may be requested by any interested person who desires the service.

(b) *Limitations.* One or more interested persons may request a reinspection but only one reinspection may be obtained from any original inspection (or succeeding original inspection). No reinspection may be obtained from an inspection resulting in issuance of a certificate that has been superseded, or from a reinspection.

§ 26.36 Where and when to request a reinspection and information required.

(a) *Where to file.* A request for a reinspection shall be filed with the official inspection agency, or in the case of

U.S. grain in Canadian ports, with the field office, in the designated inspection area in which the original (or succeeding original) inspection in question was made, or with the official inspection agency, or in the case of U.S. grain in Canadian ports, the field office, in the designated inspection area in which the grain is located. If the request is made orally or by telegraph, it shall, at the request of the official inspection agency, or field office, be confirmed in writing in accordance with paragraph (b) of this section. (For locations where inspection services are available, see § 26.9(d).)

(b) *Written confirmation.* If a written confirmation is requested, it shall be signed by the applicant or his agent; and shall, except as provided in paragraph (c) of this section, show, or be accompanied by, the following information or documents: (1) The identification, quantity, and the specific location of the grain, if known; (2) the reason for requesting the reinspection, stated in terms of the factor or factors in question (not applicable to requests filed in advance); (3) the name and mailing address of the applicant; (4) the original official certificate for the inspection in question; (5) a statement showing whether a request for a reinspection, or a request for an appeal inspection, on the grain in question has been filed with any other official inspection agency, or with the Grain Division, and the place of filing, if any; and (6) such other pertinent information as may be required in specific cases by the official inspection agency or field office conducting the reinspection. (Copies of an approved application form will be furnished by an official inspection agency or field office upon request.)

(c) *Delayed documents.* (1) If the information or documents required by paragraph (b) of this section are not available at the time of filing the request, the applicant

shall submit the information or documents, or cause them to be submitted, as soon as they are available. At the discretion of the official inspection agency, or in the case of U.S. grain in Canadian ports, the field office conducting the reinspection, action on the reinspection may be withheld pending the receipt of the information or documents required by paragraph (b) of this section.

(2) In no case shall a reinspection certificate be issued unless the information and documents required by paragraph (b) of this section are filed with the official inspection agency, or in the case of U.S. grain in Canadian ports, the field office, or it is found by the official inspection agency, or the field office, that some of the information or documents are not available but sufficient information is available to enable performance of the reinspection. If it is found that any of the required information or documents is not available, a record of the finding shall be included in the record of the reinspection.

(d) *When to file.* (1) A request for a reinspection must be filed (i) before the grain has left the designated inspection area where the grain was located when the inspection in question was made; (ii) before the identity of the grain has been lost, as provided in § 26.17 and (iii) as promptly as possible, but not later than the close of business on the second business day following the date of the inspection in question.

(2) If a representative file sample, as prescribed in § 26.8(f), is available, the official inspection agency, or in the case of U.S. grain in Canadian ports, the field office, conducting the reinspection may, upon written request by the applicant and the respondents, if any, waive the requirements of subparagraph (1) of this paragraph. The requirement in subparagraph (1)(iii) of this paragraph, may also be waived by the official inspection agency, or the

field office, upon a satisfactory showing by any interested person of the existence of fraud or that on account of distance or other good cause the time allowed for filing was not sufficient.

(3) A record of each waiver action must be included by the official inspection agency, or the field office, in the record of the reinspection.

(e) *Advanced notice.* If desired by the applicant, requests for reinspections may be filed in advance of the original (or succeeding original) inspection which is in question.

(f) *Multiple request.* A request for a reinspection may cover one or more identified lots or samples.

(g) *Recording date of filing.* A request for a reinspection shall be deemed filed when it is received by the official inspection agency, or in the case of U.S. grain in Canadian ports, the field office, conducting the reinspection and when the grain is offered for inspection. A record showing the date of filing shall be made promptly by the official inspection agency, or field office.

§ 26.45 Who may request an appeal inspection.

(a) *General.* An appeal inspection from an original inspection (or succeeding original inspection) or a reinspection may be requested by any interested person who desires the service. (See also § 26.50 concerning a Board appeal inspection.)

(b) *Limitations.* One or more interested persons may request an appeal inspection but only one appeal inspection may be obtained from any original inspection (or succeeding original inspection), or from any reinspection. (A Board appeal inspection may be obtained only from an appeal inspection conducted by a field office.) No appeal

inspection may be obtained from any inspection resulting in the issuance of a certificate that has been superseded by another certificate.

§ 26.46 Where and when to request an appeal inspection and information required.

(a) *Where to file.* A request for an appeal inspection shall be filed with the field office in the circuit in which the original inspection or reinspection in question was made, or with the field office in the circuit in which the grain is located. If the request is made orally, it shall be confirmed in writing in accordance with paragraph (b) of this section. (For locations where inspection services are available, see § 26.9(d).)

(b) *Written confirmation.* Each request for an appeal inspection shall be in writing; shall be signed by the applicant or his agent; and except as provided in paragraph (c)(2) of this section, shall show, or be accompanied by, the following information or documents: (1) The identification, quantity, and specific location of the grain, if known; (2) the reason for requesting the appeal inspection, stated in terms of the factor or factors in question (not applicable to requests filed in advance); (3) the names and mailing addresses of the applicant and the respondents, if any; (4) the original official certificate for the inspection in question; (5) a statement showing whether a request for an appeal inspection on the grain in question has been filed with any other field office, and the other place of filing, if any; and (6) such other pertinent information as may be required by the field office in specific cases. (Copies of an approved application form will be furnished by field offices upon request.)

(c) *Delayed documents.* (1) If the information or documents required by paragraph (b) of this section are not

available at the time of filing the request, the applicant shall submit the information or documents, or cause them to be submitted, as soon as they are available. At the discretion of the field office conducting the appeal inspection, action on the appeal inspection may be withheld pending the receipt of the information or documents required by paragraph (b) of this section.

(2) In no case shall an appeal inspection certificate be issued unless the information and documents required by paragraph (b) of this section are filed in the field office, or it is found by the field office that some of the information or documents are not available but sufficient information is available to enable performance of the appeal inspection. If it is found that any of the required information or documents is not available, a record of the finding shall be included in the record of the appeal inspection.

(d) *When to file.* (1) For lots which are to be inspected during loading, unloading, or handling, a request for an appeal inspection shall be filed in advance of the inspection in question.

(2) For lots other than the lots identified in subparagraph (1) of this paragraph and for submitted samples, a request for an appeal inspection must be filed (i) before the grain has left the designated inspection area where the grain was located when the inspection in question was made; (ii) before the identity of the grain has been lost, as provided in § 26.17; and (iii) as promptly as possible, but not later than the close of business on the second business day following the date of the inspection in question.

§ 26.48 Who shall handle appeal inspections, and method and order of performance.

(a) *United States.* An appeal inspection on grain located in the United States shall be conducted by a field office.

(b) *Canada.* An appeal inspection on U.S. grain in Canadian ports shall be conducted by the Board of Appeals and Review.

(c) *Scope.* The scope of an appeal inspection shall be confined to the scope of the inspection in question: *Provided,* That an appeal inspection for grade shall include a review of all factors which may determine the accurate and true grade at the time and place of the appeal inspection.

(d) *Method and order.* The method and order of service shall be in accordance with the provisions of § 26.12. For the purpose of this section, statistical tolerances for expected variations between inspections shall be applied to the results of the appeal inspection in determining whether the results of the inspection in question were or were not materially in error. The statistical tolerances shall, in all cases, be those set forth in the instructions.

(e) *New sample.* Upon request of the applicant, and if practicable, a new sample shall be obtained and examined as a part of an appeal inspection.

(f) *Conflict of interest.* No grain inspection supervisor shall perform, or participate in performing, or issue an official certificate for an appeal inspection involving the correctness of inspections performed or certificated by him: *Provided,* That this requirement is waived if there is only one duly qualified person available at the time and place of the appeal inspection.

§ 26.50 Appeal Inspection by Board of Appeals and Review.

(a) *Formation of Board.* The Board of Appeals and Review in the Grain Division is responsible for the supervision of the official inspection of grain to maintain uniformity and accuracy of inspection, and to perform appeal inspec-

tions in accordance with the Act and regulations. For the purpose of this section the Board of Appeals and Review shall be considered a field office with the entire United States and Canada as its circuit.

(b) *Who may request.* An appeal inspection by the Board of Appeals and Review may be requested by an applicant from an inspection conducted by a field office.

(c) *Filing requirements.* (1) A request for an appeal inspection by the Board of Appeals and Review shall be filed with the field office which conducted the inspection in question, or with the field office in the circuit in which the grain is located, or with the Board of Appeals and Review.

(2) Except as otherwise provided in this paragraph, each request shall be filed in accordance with the provisions of §§ 26.45 and 26.46, and the request may be withdrawn or dismissed in accordance with the provisions of § 26.47. Each request shall show pertinent information specified in the form or as may be required in specific cases by the Board of Appeals and Review, and shall be filed not later than the close of business on the next business day after the date of the inspection in question. The Board of Appeals and Review may, for good cause shown, extend the time for filing the request. (Copies of an approved application form will be furnished by field offices upon request.)

(d) *Performance and issuance.* The appeal inspection shall be performed in accordance with the provisions of § 26.48; and an appeal inspection certificate shall be issued in accordance with the provisions of § 26.49. An appeal inspection certificate issued by the Board of Appeals and Review shall be the final appeal inspection certificate.

(e) *Action by field office.* The field office which conducted the inspection in question shall act in a liaison capacity

between the applicant requesting the appeal inspection and the Board of Appeals and Review, and shall promptly forward to the Board of Appeals and Review all available samples, documents, and other evidence pertaining to the inspection in question.

APPENDIX B

Treaties.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS
21 U.S. T. 2517, T.I.A.S. No. 6997

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.